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Todd Klein

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eBay v. MercExchange and *KSR Int'l Co. v. Teleflex, Inc.*: The Supreme Court Wages War Against Patent Trolls

Todd Klein*

I. Introduction

Imagine that you are the owner of a small to mid-sized company called Windows R' Us that manufactures windows in the state of Pennsylvania.¹ Your company has manufactured windows by way of a very specific process for five years and has produced beautiful windows. Without your knowledge, See Thru, a company that manufactures windows out of California and is on the verge of bankruptcy, sold its patent portfolio to Sneak-a-Peak. Although See Thru has never mentioned that your manufacturing process was infringing a process patent that they owned, Sneak-a-Peak now makes you aware of this fact. However, Sneak-a-Peak is not even in the business of manufacturing windows. Instead, Sneak-a-Peak is a company that owns several hundred patents and spends its time locating companies that are creating products that infringe any the patents that it owns. Regardless of how See Thru feels and whether or not you are competing with See Thru for potential customers, Sneak-a-Peak now owns this patent and has every right to either enter into a licensing agreement with you or sue you for infringement. You are now in quite a bind. If you do not enter into a licensing agreement, you will potentially be liable for monetary damages and are running the risk of having a permanent injunction issued against you. This permanent injunction could put you out of business forever. You have just been victimized by a patent troll.

“Patent trolls,” also known as “non-practicing entities” or “patent holding companies,” are essentially non-manufacturing patent owners

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, expected May 2008.

1. This is simply a hypothetical to show the possible devastation that patent trolls can cause. The company could be manufacturing any product through any method.

who are either individuals or companies that purchase patents and assert them with no intention of creating or manufacturing a product using the patented technology.² Although the Supreme Court has never spoken directly on the issue of patent trolls,³ Congress has previously taken steps to minimize the damage that patent trolls can cause to manufacturing companies.⁴ Additionally, many scholars in the intellectual property industry are critics of the methods that patent trolls utilize in making enormous profits on their patented technologies without actually manufacturing any products.⁵

The Assistant General Counsel for Intel, Peter Detkin, coined the term “patent troll” in 2001 when he was defending Intel in infringement suits that were necessitated by these patent trolls.⁶ According to Detkin, a patent troll is “somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced.”⁷ Patent trolls can be individuals or organizations whose main or sole purpose is to threaten large, deep-pocketed companies with litigation. This enables them to generate large amounts of revenue through licensing because the deep-pocketed companies want to avoid litigation and the possibility of a subsequent permanent injunction.⁸

2. David G. Barker, *Troll or No Troll? Policing Patent Usage with an Open Post-Grant Review*, 2005 DUKE L. & TECH. REV. 9, 7 (2005).

3. Robert P. Merges, *Supreme Court Development: Introductory Note to Brief of Amicus Curiae in eBay v. MercExchange*, 21 BERKELEY TECH. L.J. 997 (2006). However, in his concurring opinion, Justice Kennedy does refer directly to the threat posed by patent trolls, although he never uses the phrase “patent trolls” and instead describes them as firms who use patents “not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.” *eBay v. MercExchange*, 126 S. Ct. 1837, 1842 (2006) (Kennedy, J., concurring).

4. Brief for Yahoo! Inc. as Amici Curiae Supporting Petitioner, *eBay, Inc. v. MercExchange*, L.L.C., 126 S. Ct. 1837 (2006) (No. 05-130). In the past, patent trolls created what were known as “submarine patents” whereby they submitted an application for a patent, but failed to reveal that fact until after a manufacturing company had already spent a considerable sum of money developing a product that arguably infringed the patent. At that time, the patent troll would quickly try to force their patent application into issue. *Id.* Congress’ amendment to the Patent Act in 1999 now requires patent applications to be published eighteen months after filing. 35 U.S.C. § 122(b)(1)(A) (2006). However, there are still many methods of avoiding this publication. One such method is achieved by the applicant guaranteeing that he/she will not file the application in any other country with an eighteen-month publication requirement. 35 U.S.C. § 122(b)(2)(B)(i) (2006).

5. Elizabeth D. Ferrill, *Patent Investment Trusts: Let’s Build a PIT to Catch the Patent Trolls*, 6 N.C. J.L. & TECH. 367, 377 (2005).

6. M. Qaiser & P. Mohan Chandran, *Patent Terrorism—Terror of the Intangibles*, ENTERPRISE IP, June 27, 2006, <http://www.ipfrontline.com/depts/article.asp?id=11605&depid=3> (last visited June 1, 2007).

7. *Id.*

8. *See id.*

This Comment will analyze two cases on which the Supreme Court has recently ruled.⁹ Specifically, Part I of this Comment will detail how the holdings of those cases have the potential of combating patent trolls and preventing them from causing such a significant amount of harm to accused patent infringers. Part II of this Comment gives examples of specific companies that are patent trolls and what they have accomplished in their business practices. This should generate a further understanding of the devastation that they cause to the individuals and companies that they accuse of infringement. Part III explores whether the patent trolling industry is bad for inventors and the world at large.

Part IV focuses on the *eBay* case, the precedent cases, and how injunctions are granted under the Copyright Act. Part IV also explains how the Court's decision in the *eBay* case can be seen as a method of combating patent trolls. Part V switches the concentration of this Comment to the *KSR* case. Part V will focus on the standard of obviousness that the Court of Appeals for the Federal Circuit had been using prior to the Supreme Court's reversal. Part V also delves into the oral arguments heard by the Supreme Court in the *KSR* case. Part VI discusses the implications that overruling the test announced by Court of Appeals for the Federal Circuit will have on patent trolls.

II. Examples of Companies that are Patent Trolls

To get a better sense of what a patent troll does and why they face such a great deal of criticism, it is helpful to provide a few examples of litigation that has been initiated by patent trolls.

A. *NTP, Inc.*

Research In Motion (RIM) is the company that makes the Blackberry.¹⁰ The Blackberry utilizes a technology that is covered by a patent owned by NTP, Inc. (NTP).¹¹ NTP is known to be a patent holding company that does not make any products but instead acquires patent portfolios in order to sue deep-pocketed companies for infringement.¹² As a result of a patent infringement suit initiated by NTP against RIM, after five years of litigation, RIM decided to settle the suit for \$612.5 million in order to avoid having a permanent injunction issued against them and having the Blackberry service shut down its 4.3 million

9. The two cases are *eBay v. MercExchange*, 126 S. Ct. 1837 (2006) and *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007).

10. David V. Radack, *Patent Trolls: Pay up or Fight?* 8 LAW. J. 3, 3 (2006).

11. *Id.*

12. Qaiser & Chandran, *supra* note 6, at 1.

subscribers.¹³

B. Acacia Technologies

Another example of a patent troll is a company called Acacia Technologies (AT).¹⁴ AT has acquired twenty patent portfolios comprising approximately 127 patents.¹⁵ As AT's staff is comprised mostly of attorneys and accountants with only a few engineers whose sole job is to analyze existing patents, AT clearly fits the definition of a patent troll.¹⁶ AT has made millions of dollars from licensing fees by targeting companies that will suffer more harm through the threat of a permanent injunction than by payment to AT.¹⁷ There are many other companies that are considered patent trolls, and their effect on the intellectual property industry has been more severe in recent years than before. This is based solely upon the fact that the number of patent litigation suits had doubled between 1995 and 2004.¹⁸

C. Forgent Networks

One final example of a patent troll is Forgent Networks.¹⁹ Forgent Networks acquired a patent related to data compression technology giving them the exclusive right to use the JPEG method of compressing digital video images.²⁰ In 2004, Forgent sued forty companies worldwide for infringement of its patented technology.²¹ Thus far, Forgent has received over \$100 million in licensing fees as a result of these lawsuits. That number is expected to increase to over \$1 billion once they reach an agreement with Dell and the companies that they sued in 2005 as a result of a different patent.²²

13. Radack, *supra* note 10, at 3.

14. Ferrill, *supra* note 5, at 374.

15. Qaiser & Chandran, *supra* note 6, at 2.

16. Ferrill, *supra* note 5, at 374.

17. *Id.*

18. Joe Fowler, "Patent Trolls" Stalk This Land, MANUFACTURING BUS. TECH., http://www.mbtmag.com/current_issues/2005/dec/busperfl.asp (last visited June 1, 2007).

19. Qaiser & Chandran, *supra* note 6, at 2.

20. *Id.*

21. *Id.*

22. *Id.* In the middle of 2005, Forgent Networks sued fifteen companies for infringing one of its patents that dealt with a computer regulated video system enabling playback during recording. *Id.* A few more examples of patent trolls are Fougines & Day, Karlin Technology, PhoneTel, and Eolas Technologies. See Qaiser & Chandran, *supra* note 6, at 2.

III. Patent Trolls: Good for Business or Bad for Innovation?

A. *Why Scholars are Against the Patent Trolling Industry*

Scholars in the industry have many reasons for opposing the patent trolling industry. At the outset, it may seem reasonable for an individual or company who owns the rights to a patent to charge licensing fees to other companies or individuals who wish to use the patented technology in a product that they are manufacturing. However, the problem is that under the general rule announced by the United States Court of Appeals for the Federal Circuit (Federal Circuit),²³ companies that owned the rights to a patent were able to charge exorbitant licensing fees due to the threat of a permanent injunction issuing against the potential licensee.²⁴ Basically, a company that is manufacturing a product that incorporates another company's patented technology will be harmed more by facing the possibility of a permanent injunction being issued against it than by simply paying the licensing fee that the patent owner requests.²⁵ This is true regardless of how high and unfairly priced that licensing fee may be.²⁶

Additionally, some believe that patent trolls deter innovation.²⁷ The United States Constitution states, "Congress shall have the power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."²⁸ The founders wanted to give the people of the United States an incentive to create inventions in order to promote the arts and sciences in this country.²⁹ The founders did this by giving inventors the right to an exclusive period of ownership over their

23. The general rule is discussed in Part IV of this Comment. In *MercExchange*, the Federal Circuit held that courts would issue permanent injunctions against patent infringers absent exceptional circumstances. Essentially, this created a rule that made the issuance of permanent injunctions automatic subsequent to a finding of infringement. See *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005). However, that verdict was overturned when it was appealed to the Supreme Court. See *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006).

24. Brief for Yahoo! Inc. as Amici Curiae Supporting Petitioner, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

25. *Id.*

26. *Id.* Although a licensing fee may take a substantial portion of a company's profits, a court ordered permanent injunction can put that company out of business completely by preventing it from making the product that the business relies on altogether. Anthony J. Fitzpatrick, *Patent Infringement Injunctions Will Likely Hold Some Surprises Now*, <http://www.duanemorris.com/articles/article2252.html> (last visited June 1, 2007).

27. Barker, *supra* note 2, at 8.

28. U.S. CONST. art. I, § 8, cl. 8.

29. Ferrill, *supra* note 5, at 369.

invention, so they may profit from the expense and time that they put into creating their invention.³⁰ Typically, patent trolls are not inventors themselves, but rather they are companies that purchase patents from inventors with the sole purpose of suing for infringement any company that is using the patented technology.³¹ In doing so, these patent trolls, who are not inventors, are deterring actual inventors from continuing to invent.³² Although the inventors may create a new and useful technology, if that new technology uses any component of an already patented technology, they will be facing large licensing fees³³ and possibly a permanent injunction.³⁴

One final argument supporting the assertion that the patent trolling industry is an unfair business practice is that oftentimes patent trolls will purchase ten to fifteen-year-old patents that had not been enforced for that entire period, irrespective of whether or not individuals and companies had been infringing the patent.³⁵ The companies later accused of infringement have been doing business without notice of the patent for that entire period and therefore feel very secure in their business practices.³⁶ Additionally, quite befitting of the word “troll,” it is not uncommon for a patent troll to know about an invention that infringes one of its patents as it is first coming to the market.³⁷ These trolls then wait for investors to throw huge amounts of money into the supposed new invention.³⁸ At that point, they strike out at the maker of the invention demanding exorbitant licensing fees with the risk that if the

30. Brief for Yahoo! Inc. as Amici Curiae Supporting Petitioner, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

31. Barker, *supra* note 2, at 7.

32. Brief for Yahoo! Inc. as Amici Curiae Supporting Petitioner, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

33. There is also an idea called “cross-licensing arrangements” that plays a role. *Id.* Legitimate companies engage in what is known as “defensive patenting” by receiving the rights to patents that they will not be using at the current time so that they can have the rights to that technology in case they need it in the future. *Id.* The result is that company A will have the patent to a technology that company B is using, but company A will also be using patented technologies that are owned by company B or other rival companies. *Id.* In this situation, “each side has a strong incentive to decline to enforce their patents in return for mutual forbearance.” *Id.* However, these cross-licensing arrangements do not deter patent trolls from attempting to acquire large licensing fees because they are non-practicing entities and remain unaffected by these practices. *Id.*

34. Brief for Yahoo! Inc. as Amici Curiae Supporting Petitioner, *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006) (No. 05-130).

35. See Geoff Daily, *Acacia Makes Its Case*, STREAMING MEDIA, Mar. 9, 2005, <http://www.streamingmedia.com/article.asp?id=9041&page=1&c=31> (last visited June 1, 2007).

36. *Id.*

37. Michael Bloc, *Beware the Patent Trolls*, TAMING THE BEAST, <http://www.tamingthebeast.net/articles6/patent-troll.htm> (last visited June 1, 2007).

38. *Id.*

inventor does not agree to the licensing agreement, a very expensive legal battle will begin.³⁹ In this way, patent trolls are simply extorting huge royalties out of companies and inventors through their questionable business practices.⁴⁰

B. Why Scholars Believe that Patent Trolls Are Not Bad For Innovation

Aside from all of the negative connotations that come along with the phrase “patent troll,” many scholars believe that these entities cause no harm.⁴¹ In keeping with that, these scholars see no reason for Congress or the courts to take any affirmative action to prevent patent trolls from continuing to sue companies for infringement and extract large licensing fees from them.⁴² There are three major arguments as to the benefits patent trolls bring to the intellectual property industry.⁴³ First, by purchasing patents from inventors, patent trolls thereby give inventors more capital to continue to invent new and useful technologies.⁴⁴ Second, patent trolls somewhat level the playing field for small inventors by going after the larger companies.⁴⁵ Third, patent trolls are simply utilizing patents in the way that they were meant to be used, as property.⁴⁶

If patent trolls are able to purchase patents from inventors and then enforce the patent rights through litigation, the inventors could do the same thing for themselves. In most cases, there is a good chance that the inventor will be able to make a substantially larger amount of money through litigation and patent enforcement than by selling the rights to his or her patented invention; otherwise the patent trolling industry would not be able to survive. It is hard to believe that patent trolls are enabling inventors to have more capital in order to continue to invent; in fact, it appears that the opposite is true.

However, patent trolls often purchase patents from individual inventors who simply do not have the resources to license or enforce their own patents.⁴⁷ For these types of inventors, patent trolls can use

39. *Id.*

40. *Id.*

41. Phosita, Posting of Melody Wirz to phosita, *Patent Trolling—Good or Bad?*, http://www.okpatents.com/phosita/archives/2005/04/patent_trolling.html (Apr. 1, 2005, 9:33 EST).

42. *Id.*

43. Ferrill, *supra* note 5, at 378-79.

44. *Id.*

45. *Id.*

46. *Id.*

47. Daily, *supra* note 35, at 1.

their large bank accounts⁴⁸ to prosecute patent litigation suits or to acquire licensing fees and pay the inventor a fair price for his or her invention.⁴⁹ In so doing, these patent trolls give the inventors more capital to invest in new inventions while making a fairly substantial profit for themselves.

The third argument has the most merit in giving patent trolls a legitimate reason to continue their current practice. The third theory is that patent trolls are beneficial because they are simply using patent rights as property as was intended by the framers of the Constitution. The right associated with patent ownership is the right to “exclude others from making, using, offering for sale or selling the invention throughout the United States. . . .”⁵⁰ Simply put, patent trolls are doing exactly what the Constitution and the Patent Act have given them a right to do: sue individuals and companies for infringement when those individuals or companies utilize the patent troll’s patented technology.⁵¹ This stands as the major reason why scholars who are “pro patent troll” do not believe patent trolls are committing any wrongs by suing for infringement when their patented technology has legitimately been infringed.⁵² Nevertheless, the harms caused by the patent trolling industry outweigh the benefits to society. Whether or not the patent trolling industry is a legitimate one, there is no reason that Congress and the Supreme Court cannot combine their efforts to slow down or put an end to this industry in order to safeguard the companies who are suffering as a result of the patent trolls’ infringement law suits.

IV. *eBay, Inc. v. MercExchange*: Permanent Injunctions Are Not Automatic Subsequent to a Finding of Infringement in Patent Litigation Cases

There are two cases that the Supreme Court has recently ruled on which implicitly take a stand against patent trolls.⁵³ In *eBay v.*

48. For example, Acacia Technologies has \$30 million in the bank and is fully capable of enforcing the patents that they have purchased. Nancy Gohring, *Hotspot Operators Face New Patent Fee Demand*, WI-FI NETWORKING NEWS, October 5, 2004, <http://wifinetnews.com/archives/004184.html> (last visited June 1, 2007).

49. More often than not, the licensing fee being charged is unfair and typically considered exorbitant. See Bloc, *supra* note 37; Posting of Joe to The Fire of Genius, <http://www.thefireofgenius.com/2006/05/15/the-ebay-earthquake-part-2/> (May 15, 2006, 10:50 EST).

50. 35 U.S.C. § 154(a)(1) (2006).

51. See U.S. CONST. art. I, § 8, cl. 8; 35 U.S.C. § 271 (1994).

52. Phosita, Posting of Melody Wirz to phosita, *Patent Trolling—Good or Bad?*, http://www.okpatents.com/phosita/archives/2005/04/patent_trolling.html (Apr. 1, 2005, 9:33 EST).

53. Ben Klemens, *The Supreme Court’s Patent Trilogy: An Analysis*, BROOKINGS INSTITUTION, May 30, 2006, <http://www.brookings.edu/views/op-ed/>

MercExchange,⁵⁴ the Supreme Court vacated a decision by the Federal Circuit.⁵⁵ In the case before the Federal Circuit, *MercExchange*, a patent troll holding a “business method patent for an electronic market designed to facilitate the sale of goods between private individuals” sued eBay for infringement based on eBay’s “Buy It Now” feature.⁵⁶ The Federal Circuit granted a permanent injunction to *MercExchange* thereby prohibiting eBay from using the “Buy It Now” feature in the future.⁵⁷ However, the Supreme Court of the United States vacated that decision finding that the traditional four-factor test applied by courts of equity when determining whether or not to grant a permanent injunction⁵⁸ also applies to cases arising under the Patent Act.⁵⁹

The Supreme Court’s holding in *eBay* is strictly what Congress intended when it created the Patent Act.⁶⁰ Section 283 of the Patent Act states that courts “may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.”⁶¹ Because the Patent Act explicitly says that injunctions may be granted according to the principles of equity, the four-factor test established by the Court, a test that is a well-established principle of equity, is the proper test to be used.⁶² The Supreme Court also noted that it is within the discretion of the district courts to determine whether a permanent injunction is proper according to the four-factor test.⁶³

20060530klemens.htm (last visited June 1, 2007).

54. *eBay v. MercExchange*, 126 S. Ct. 1837, 1839 (2006).

55. *MercExchange v. eBay*, 401 F.3d 1323, 1339 (Fed. Cir. 2005) (holding that the general rule is that courts will issue permanent injunctions against patent infringers absent exceptional circumstances).

56. *eBay*, 126 S. Ct. at 1839.

57. *MercExchange*, 401 F.3d at 1339.

58. *eBay*, 126 S. Ct. at 1839. In order to be awarded a permanent injunction, a court must apply the following four factor test:

- [A] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id.

59. Volume 35 of the United States Code is collectively known as the Patent Act. The specific provision regarding injunctions comes from 35 U.S.C. § 283.

60. 35 U.S.C. § 283 (2006).

61. *Id.*

62. *eBay v. MercExchange*, 126 S. Ct. 1837, 1839 (2006).

63. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982)).

A. *The Standard for Obtaining a Permanent Injunction in a Patent Case*

For almost a century prior to *eBay*, courts have turned to the holding in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*⁶⁴ when determining whether or not to grant a plaintiff injunctive relief. In that case, the Court held that a patent owner could choose to use or not to use his patent as he sees fit.⁶⁵ He has the exclusive right to that patent, and therefore maintains the right to exclude others from using the patented invention whether or not the patent owner himself is using it.⁶⁶ The Court also made a distinction between reasonable and unreasonable non-use of a patent.⁶⁷ Although they granted the injunction in this particular case,⁶⁸ the court made no decision on the issue of whether a case might arise where “regarding the situation of the parties in view of the public interest, a court of equity might be justified in withholding relief by injunction.”⁶⁹ The cases since *Continental Paper Bag* have heeded the Supreme Court’s decision not to decide whether a court could withhold injunctive relief and, in many cases, courts have withheld injunctive relief for various reasons.⁷⁰

B. *Contrary to the Federal Circuit’s Decision in eBay, Courts Have a History of Only Granting Permanent Injunctions when Absolutely Necessary*

Although the Federal Circuit announced its general rule, the trend prior to that decision seems to have been that lower courts would issue permanent injunctions only when completely necessary.⁷¹ In *Foster v.*

64. *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405 (1908).

65. *Id.* at 425.

66. *Id.*

67. *Id.* at 427-29.

68. *Id.* at 430.

69. *Id.*

70. *See Foster v. Am. Mach. & Foundry Co.*, 492 F.2d 1317, 1321 (2d Cir. 1974) (holding that a permanent injunction will not be issued because American Machine would suffer an irreparable hardship and Foster will gain no appreciable benefit); *Nerney v. New York*, 83 F.2d 409, 411 (2d Cir. 1936) (holding that a permanent injunction will not be issued because an injunction would cause greater injury to Nerney than benefit to New York). Most often, the courts that have withheld the granting of a permanent injunction have done so because an injunction would subject the infringer to an undue hardship. *Foster*, 492 F.2d at 1321. This includes an injunction that would cause greater injury to the infringer than benefit to the patent owner. *Id.*

71. Typically, this meant that permanent injunctions would be awarded when the court determined that the patent was valid and there was a continuing infringement or a strong likelihood that the infringer would continue to do so without a permanent injunction. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 544-46 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *W.L. Gore & Assoc., Inc. v.*

American Machine & Foundry Company,⁷² the Second Circuit found that American Machine had infringed upon the patent holder's welding system patent.⁷³ On appeal, the patent holder argued, inter alia, that the district court erred by not awarding him a permanent injunction to prevent American Machine from using his patented invention in the future.⁷⁴ However, the Second Circuit upheld the finding that an injunction would be inappropriate because, as an injunction is "an equitable remedy to be determined by the circumstances," American Machine, as a manufacturer of the product, would be subjected to an "irreparable hardship . . . without any concomitant benefit to the patentee" who does not manufacture the product.⁷⁵ Instead of issuing an injunction in this case,⁷⁶ the court created a compulsory license so that the patent holder could collect royalties on all of American Machine's future sales of the patented system.⁷⁷

Although Foster is not a patent troll as that term is now defined in the industry, the court found that because he was not manufacturing the product that the accused infringer was making, but instead merely owned the rights to a patent that was incorporated into the accused infringer's product, an injunction was inappropriate and monetary damages would suffice.⁷⁸ The court's decision in *Foster* is very much on point with what the Supreme Court held in *eBay*.⁷⁹ The court in *Foster* essentially used prong three of the four-factor test⁸⁰ in determining that it was not appropriate to issue a permanent injunction.⁸¹ The court decided that because the accused infringer manufactured the product and the patent holder did not, issuing an injunction would result in irreparable harm to the accused infringer and would not provide any benefit to the patent holder.⁸²

Garlock, Inc., 842 F.2d 1275 (Fed. Cir. 1988); *Roche Prod., Inc. v. Bolar Pharm. Co.*, 733 F.2d 858, 865-66 (Fed. Cir. 1984).

72. 492 F.2d 1317 (2d Cir. 1974).

73. *Foster*, 492 F.2d at 1319.

74. *Id.* at 1324.

75. *Id.* The Second Circuit determined long ago that "[w]here it appears that a much greater injury will be done to the infringer than benefit to the patentee, the court may, within its equity power, grant an accounting only and deny injunctive relief." *Nemey v. New York*, 83 F.2d 409, 411 (2d Cir. 1936).

76. Had an injunction been issued, American Machine would have been put out of business without providing any benefit to the patent holder.

77. *Foster*, 492 F.2d at 1324.

78. *Id.*

79. *eBay v. MercExchange*, 126 S. Ct. 1837, 1841 (2006).

80. *See supra* note 58.

81. *Foster*, 492 F.2d at 1324.

82. *Id.*

C. *Justice Kennedy's Concurrence in eBay*

Although the majority opinion in *eBay* did not distinguish between non-practicing entities and legitimate companies that do manufacture products, Justice Kennedy, in his concurrence, explicitly discussed the emerging industry developed by patent trolls.⁸³ Justice Kennedy noted that with the emergence of the industry of patent owners who use patents solely for obtaining licensing fees, “an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”⁸⁴ Justice Kennedy went on to say:

When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.⁸⁵

It seems that Justice Kennedy was willing to come right out and say what the majority of the Court was unwilling to do.⁸⁶ He sent a warning to patent trolls that the Supreme Court would be willing to make changes in order to fight their existence and make it easier for manufacturing companies to survive litigation when sued by patent trolls.⁸⁷ Justice Kennedy recognized that the patent system was changing and that under the Patent Act, the equitable discretion granted to the courts should enable the courts to be able to adapt to those changes and maintain a positive environment for inventors to continue to develop new technologies.⁸⁸

D. *The Supreme Court's Holding in eBay is Consistent with the Way Courts Determine Injunctive Relief Under the Copyright Act*

Very similar to the rights granted to patent owners under the Patent Act, Congress created title 17 of the United States Code and called it the Copyright Act.⁸⁹ Under the Copyright Act, a court may grant “temporary and final injunctions on such terms as it may deem reasonable to prevent

83. *eBay*, 126 S. Ct. at 1842 (Kennedy, J., concurring).

84. *Id.*

85. *Id.*

86. *Id.*

87. *See id.*

88. *Id.* As noted above, the Patent Act states that courts may grant injunctions “on such terms as the court deems reasonable.” 35 U.S.C. § 283 (2006). This statute grants the district courts significant latitude in determining whether or not they believe an injunction is fair and/or necessary. *See id.*

89. 17 U.S.C. § 101 et al.

or restrain infringement of a copyright.”⁹⁰ The Supreme Court has consistently rejected the theory that permanent injunctions should issue automatically subsequent to a finding of infringement in a copyright case.⁹¹ The Supreme Court has explicitly stated, “[T]he goals of the copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.”⁹² Where there is a strong public interest in allowing the second publication, and the copyright owner’s interests can be fairly met by an award of monetary damages, the Court will refuse to grant injunctive relief.⁹³ Therefore, just as the Supreme Court held in *eBay*, the copyright owner must survive a test before an injunction will be granted; not only is an automatic injunction rule against the policies of 17 U.S.C. § 502(a), such a rule is inherently unfair to the public interest and to the accused copyright infringer.⁹⁴

E. The eBay Decision Will Make it More Difficult for Patent Trolls to Receive Permanent Injunctions Against their Patent Infringement Victims

As was mentioned above, the Supreme Court held in the *eBay* case that before granting a patent owner a permanent injunction against an infringer, a court must first ensure that the four-factor test laid out above⁹⁵ has been satisfied.⁹⁶ By solidifying this rule and reversing the Federal Circuit’s general rule that a permanent injunction will issue following a finding of patent infringement,⁹⁷ the Supreme Court has taken the first step towards minimizing the damage that a patent troll can have on a company or individual inventor.

The third prong of the four-factor test will have the most immediate impact in preventing patent trolls from damaging companies and individuals as significantly as they have in the past.⁹⁸ Under that prong,

90. 17 U.S.C. § 502(a) (2006).

91. *eBay v. MercExchange*, 126 S. Ct. 1837, 1840 (2006).

92. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

93. *Id.*

94. *Id.*

95. See *supra* note 58.

96. *eBay*, 126 S. Ct. at 1839 (2006).

97. *MercExchange v. eBay*, 401 F.3d 1323, 1339 (Fed. Cir. 2005).

98. In the first trial court decision applying the *eBay* decision, Judge Davis of the United States District Court for the Eastern District of Texas refused to grant the patent holder a permanent injunction against the infringer even though a jury verdict had already granted the patent holder \$115 million in damages. *z4 Technologies v. Microsoft*, 434 F. Supp. 2d 437, 438, 442 (D. Tex. 2006); Fitzpatrick, *supra* note 26, at 2. The court determined that the patent holder would not lose any profits if an injunction was not issued against the infringer and that the balance of hardships, prong three of the four-factor test, weighed in favor of the infringer. *z4*, 434 F. Supp. 2d at 444.

it must be shown that the benefit to the patent owner outweighs the detriment to the infringer in order for a permanent injunction to issue.⁹⁹ In the case of a patent troll, this prong will be extremely difficult to satisfy. By definition, a patent troll does not manufacture any products.¹⁰⁰ Therefore, the benefit to a patent troll of being granted a permanent injunction against an infringer, preventing the infringer from continuing to manufacture the infringing device or use the infringing process, is practically nullified because the infringing company is not taking away any business from the patent troll. The infringing company, however, will suffer a significant hardship if a permanent injunction is to issue because it will no longer be able to create the infringing product or use the infringing process that is a major component of its business practice. Therefore, through prong three of the four-factor test, it appears that patent trolls will have a difficult burden to meet in order to demonstrate that the benefit they will receive through a permanent injunction is greater than the harm to the infringing company or individual. In this way, patent trolls will have a more difficult time receiving permanent injunctions against their accused infringers.

Patent trolls will have a more difficult time acquiring exorbitant licensing fees from accused infringers as a result of the *eBay* case.¹⁰¹ One of the major reasons that companies accused of infringement chose to settle their cases prior to litigation was to avoid having a permanent injunction issued against them.¹⁰² Under the Supreme Court's four-factor test, companies accused of infringing a patent owned by a patent troll will be more willing to litigate and allow the court to determine a fair verdict, including, but not limited to, a compulsory licensing arrangement.¹⁰³ The relief that accused infringers feared the most prior to the *eBay* decision was a permanent injunction because permanent injunctions have the potential to take a company out of existence.¹⁰⁴ If a company thrives on the manufacture of one product, a permanent injunction preventing it from creating that product will put the company out of business. Now that accused infringers will be able to go to trial and actually litigate whether or not a permanent injunction is necessary,

99. *eBay*, 126 S. Ct. at 1839.

100. Barker, *supra* note 2, at 7.

101. Fitzpatrick, *supra* note 26, at 3.

102. *Id.* at 1. This was because under the Federal Circuit's rule, a permanent injunction was issued almost automatically following a finding of infringement. *MercExchange v. eBay*, 401 F.3d 1323, 1339 (Fed. Cir. 2005).

103. Fitzpatrick, *supra* note 26, at 3.

104. Tom Corrado, Ken Godlewski & Eric Sophir, Proposed Patent Act of 2005 Seeks to Raise Standard for Granting Permanent Injunctions for Patent Infringement, May 19, 2005, <http://www.kilpatrickstockton.com/publications/legal-alert.aspx?ID=30> (last visited June 1, 2007).

fair, and reasonable, patent trolls will have a more difficult time collecting exorbitant, unfair licensing fees.¹⁰⁵

The *eBay* case puts companies and individuals who have been accused of infringing a patent owned by a patent troll on more equal footing with the patent trolls. Although the decision will not put patent trolls out of business completely, it will make the effects of their lawsuits less devastating. Patent trolls will no longer be able to extract exorbitant licensing fees from accused infringers by threatening them with permanent injunctions if the accused infringer does not follow through with the patent troll's licensing fee demands. Instead, more accused infringers will litigate the infringement suits and allow the courts to determine an equitable resolution. The Supreme Court is allowing patent trolls to continue to exist, but the Court, through the *eBay* case, has definitely taken a step towards fighting the patent trolls by not allowing them to cause as much harm to accused infringers as they have in past years.¹⁰⁶

V. *KSR International Company v. Teleflex, Inc.*: Is the Standard Used by Patent Examiners when Determining if a Patent is Obvious Too Stringent?

The other case that will likely cause injury to the work of patent trolls is *KSR Int'l Co. v. Teleflex, Inc.*, a case that the United States Supreme Court decided on April 30, 2007.¹⁰⁷ In that case, Teleflex, a patent troll, was suing KSR for infringement of one of Teleflex's patents.¹⁰⁸ KSR won summary judgment at the district court level¹⁰⁹ by convincing the court that the invention was obvious based on a combination of prior art.¹¹⁰ However, the district court's ruling was

105. There is still uncertainty as to how the courts will determine whether a permanent injunction should issue in a particular case. Fitzpatrick, *supra* note 26, at 3. The debate is over whether there will be two separate trials, one for the infringement and another for the permanent injunction. *Id.* Despite the discussion amongst scholars, only time and fresh court decisions applying the *eBay* case will reveal the full ramifications of the *eBay* case. *Id.* at 4.

106. Following are some examples of settlement agreements that patent trolls have benefited from prior to the *eBay* case. Microsoft settled with Burst for \$60 million in 2005 based on a 2001 version of Windows Media Player that Microsoft marketed. Peter Burrows, *Underdog or Patent Troll*, BUSINESSWEEK ONLINE, Apr. 24, 2006, http://www.businessweek.com/magazine/content/06_17/b3981070.htm (last visited June 1, 2007). RIM paid NTP \$612.5 million in 2005 in order to settle the infringement suit over the BlackBerry. Radack, *supra* note 10, at 3. In May 2005, Medtonic, Inc. settled a 4-year long infringement suit over spinal fusion technology with Karlin Technology, Inc. for \$1.35 billion. Qaiser & Chandran, *supra* note 6, at 2.

107. *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727 (2007).

108. *Teleflex, Inc. v. KSR Int'l Co.*, 119 F.App'x. 282, 283 (Fed. Cir. 2005).

109. *Id.* at 284.

110. Under the Patent Act, a patent may not be obtained if "the differences between

overturned by the Federal Circuit, which determined that the district court improperly applied the teaching, suggestion, motivation test in its obviousness determination.¹¹¹ Following that reversal, the Supreme Court ruled that the Federal Circuit's teaching, suggestion, motivation test was too stringent.¹¹² In doing so, the Supreme Court not only reversed the *KSR* case, but also put a question mark on twenty-five years of Federal Circuit precedent utilizing the teaching, suggestion, motivation test.¹¹³

A. *Teaching, Suggestion, Motivation: The Standard of Obviousness Existing Prior to the Supreme Court Decision*

The issue in this case was whether the obviousness standard¹¹⁴ created by the Federal Circuit twenty-five years ago was too stringent; thereby allowing too many patents to issue that should have been rejected by the examiners in the United States Patent and Trademark Office (USPTO).¹¹⁵ Because the Federal Circuit's obviousness test was so strict,¹¹⁶ the examiner had the burden of finding a specific document that proved a suggestion to combine two pieces of prior art, a test that went well beyond the examiner's own personal knowledge.¹¹⁷ Under the teaching, suggestion, motivation test, a patent would only be deemed invalid if the person challenging the validity of the patent was able to show why "a person of ordinary skill in the art, possessed with the understandings and knowledge reflected in the prior art, and motivated by the general problem facing the inventor, would have been led to make the combination recited in the [patent] claims."¹¹⁸

Patent trolls took advantage of this low nonobviousness standard by

the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which such subject matter pertains." 35 U.S.C. § 103(a) (2006).

111. *Teleflex*, 119 F.App'x. at 290.

112. *KSR*, 127 S. Ct. at 1741.

113. Rachel Krevans & Matthew I. Kreeger, *Supreme Court Issues Groundbreaking Ruling Making it Easier to Invalidate Patents as Obvious*, MORRISON FOERSTER, Apr. 2007, <http://www.mofo.com/news/updates/files/12234.html> (last visited June 1, 2007).

114. The obviousness standard developed by the Federal Circuit requires examiners or courts to show detailed objective evidence of a prior teaching, suggestion, or motivation to combine inventions of prior art that would have led a person of ordinary skill in the art to combine the prior art as is claimed. *Id.* at 290.

115. Brief for Electronic Frontier Foundation as Amici Curiae Supporting Petitioner, *KSR International Co. v. Teleflex Inc.*, 119 F.App'x. 282 (2006)(No. 04-1350).

116. The obviousness test referred to here is the Federal Circuit's teaching, suggestion, motivation test.

117. *Id.*

118. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

acquiring patents on inventions that were obvious because getting a patent application to issue based on the teaching, suggestion, motivation standard of obviousness was simply too easy.¹¹⁹ This test allowed patent applications to issue that should not have issued because they were trivial or obvious over the prior art.¹²⁰ By reversing the Federal Circuit's teaching, suggestion, motivation test, the Supreme Court has taken another obvious step towards fighting the patent trolls.

B. Oral Argument

The oral argument in the *KSR* case took place on November 28, 2006.¹²¹ Throughout the oral argument, the Justices made it quite clear that they did not understand the basic principles of the teaching, suggestion, motivation test.¹²² Justice Breyer went as far as to claim that he “just [doesn’t] understand what is meant by the term ‘motivation.’”¹²³ Justice Scalia went even further when he stated that “[i]t is misleading to say that the whole world is embraced within these three nouns, teaching, suggestion, or motivation, and then you define teaching, suggestion, or motivation to mean anything that renders it nonobvious. This is gobbledygook. It really is, it’s irrational.”¹²⁴ In other words, Justice Scalia believed that the teaching, suggestion, motivation test was being used improperly such that inventions were being found nonobvious when in reality they were obvious variations of already existing prior art.¹²⁵ Furthermore, Justice Roberts, when questioning how the words “teaching, motivation, and suggestion” are any different than the word “obvious” stated that the teaching, suggestion, motivation test is “worse than meaningless because it complicates the inquiry rather than focusing on the statute.”¹²⁶

Based on the expressions of the Supreme Court Justices throughout the oral argument, it appears that they are confused as to why the teaching, suggestion, motivation test ever came into existence. Instead,

119. *Id.*

120. Brief for Ford Motor Co. and DaimlerChrysler Corp. as Amici Curiae Supporting Petitioner, *KSR Int’l Co. v. Teleflex Inc.*, 119 F.App’x. 282 (2006)(No. 04-1350).

121. Transcript of Oral Argument, *KSR Int’l Co. v. Teleflex Inc.*, et al., (No. 04-1350) (Nov. 28, 2006).

122. Posting of Michael Factor to The IP Factor, <http://blog.ipfactor.co.il/2006/11/30/ksr-v-teleflex-judge-scala-the-teaching-suggestion-motivation-test-is-gobbledygook/> (Nov. 30, 2006, 11:31 EST).

123. Transcript of Oral Argument at 9:19-20, *KSR Int’l Co. v. Teleflex Inc.*, et al., (No. 04-1350) (Nov. 28, 2006).

124. *Id.* at 41:6-12.

125. *Id.*

126. *Id.* at 40:11-13.

the Justices believe that the original statute, stating that an invention is obvious as long as a person of ordinary skill in the art at the time the invention was made believes that the invention is obvious, is the one that should be used when determining whether an invention is obvious or not.¹²⁷ When the Court wrote its Opinion in *KSR*, it followed its strong language of the Oral Argument in overruling the Federal Circuit's teaching, suggestion, motivation test in favor of using the language of section 103(a) of the Patent Act¹²⁸ as well as the precedent of *Graham v. Deere*.¹²⁹

C. *Implications that Overruling the Teaching, Suggestion, Motivation Test Will Have on Patent Trolls*

Now that the Supreme Court has overruled the Federal Circuit's teaching, suggestion, motivation test for determining whether a patent is obvious, patent trolls will undoubtedly be affected in a negative way.¹³⁰ Patent trolls will be hindered in their quest to extract large licensing fees from individuals and companies whom they accuse of infringement. Patent trolls had been able to take advantage of the low standard for passing the obviousness threshold in the USPTO. More specifically, patent trolls have acquired patents that may not otherwise have been granted if the obviousness standard was as difficult to surpass as it should be under the Patent Act.¹³¹ Under *KSR*, many infringement cases may result in a patent currently in force being invalidated because it was obvious to one of ordinary skill in the art at the time that it was made.¹³² Additionally, competitors of patent trolls may initiate reexamination proceedings,¹³³ the ultimate result of which will be patent trolls losing their patents due to obviousness.¹³⁴

It is probable that *KSR* will have the effect of invalidating patents

127. *Id.* at 44:19-23.

128. 35 U.S.C. 103(a) (2006) (stating that a patent may not be obtained "if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains").

129. *Graham v. John Deere Co.*, 383 U.S. 1 (1966). This precedent stated that when evaluating a patent under 35 U.S.C. § 103, "the scope and content of the prior art are to be determined; differences between the claims at issue and the prior art are to be ascertained; and the level of ordinary skill in the art resolved." *Id.* at 17. Additionally, *Graham* allowed secondary considerations to be viewed in order to assist in making the obviousness determination. *Id.* at 17-18.

130. *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1735 (2007).

131. See 35 U.S.C. § 103(a) (2006).

132. Krevins & Kreeger, *supra* note 114.

133. A reexamination proceeding is when the USPTO takes a second look at a patent to determine its validity, oftentimes initiated by a third party. See 35 U.S.C. § 301 et seq.

134. Krevins & Kreeger, *supra* note 114.

that were obvious at the time of creation, but there is uncertainty as to how drastic the change will be. In *KSR*, the Court stated that the Court of Customs and Patent Appeals¹³⁵ “captured a helpful insight” when they established the teaching, suggestion, motivation test.¹³⁶ Therefore, although the Court believes that the Federal Circuit applied the test too rigidly in *Teleflex*,¹³⁷ it also believes that the test is one factor that can be helpful in determining the obviousness of a patent.¹³⁸ It will be interesting to see how the patent examiners and the district courts interpret the Supreme Court’s holding in the months to come.

Although all parties who have filed patent applications in the USPTO in the past twenty-five years have benefited from the leniency associated with the obviousness standard, patent trolls may be the entities that have benefited the most. While companies were making obvious changes to their current technologies, unbeknownst to them, patent trolls were acquiring patents on those technologies.¹³⁹ By deciding to make the obviousness standard more difficult to exceed by overruling the Federal Circuit’s teaching, suggestion, motivation test, the patent trolls will be rightfully stopped from pursuing litigation against companies that are using technologies that are obvious variations of patented technologies that those companies hold.

As an example that should now be familiar, co-founder of NTP, David Stout, filed for a series of patents premised on the theory of wireless e-mail.¹⁴⁰ However, although the USPTO is now trying to invalidate many of NTP’s “wireless e-mail” patents because they were simply too obvious to merit patenting, NTP was able to do significant damage to RIM, the maker of the Blackberry.¹⁴¹ Being a patent troll is extremely risky because although it is rather easy to get a patent due to the lenient obviousness standard, it is rare that a patent troll will acquire

135. The Court of Customs and Patent Appeals is the court that originally came up with the teaching, suggestion, motivation test. It was not until 1982 that the Court of Appeals for the Federal Circuit came into existence upon Ronald Reagan’s signing of the Federal Courts Improvement Act of 1982. Court of Appeals for the Federal Circuit, <http://www.fedcir.gov> (law visited June 1, 2007); U.S. Court of Customs and Patent Appeals, http://www.fjc.gov/history/home.nsf/page/patent_bdy (last visited June 1, 2007).

136. *KSR Int’l Co. v. Teleflex, Inc.*, 127 S. Ct. 1727, 1741 (2007).

137. The case was called *Teleflex* in the Federal Circuit and was appealed by *KSR*. That is why the names *Teleflex* and *KSR* are used interchangeably throughout the preceding paragraphs.

138. *KSR*, 127 S. Ct. at 1741.

139. Posting of gabrielg01 to Technology Review, <http://www.technologyreview.com/Infotech/17459/page2/> (Sept. 6, 2006, 20:43 EST).

140. Tim Wu, *Weapons of Business Destruction: How a Tiny Little Patent Troll Got Blackberry in a Headlock*, SLATE, Feb. 6, 2006, <http://www.slate.com/id/2135559/> (last visited June 1, 2007).

141. *Id.*

a patent that will end up being worth any money.¹⁴² However, NTP's risk paid off when RIM decided to market the Blackberry, a device used by consumers primarily for its wireless internet capabilities.¹⁴³ If the patent examiners were not required to examine under strict deadlines and the lenient obviousness standard,¹⁴⁴ they may have been better fit to prevent patent trolls from collecting multi-million dollar settlements over patents that are so obvious that they should never have been granted in the first place.

VI. Conclusion

It has finally become evident to the Supreme Court that patent trolls need to be prevented from causing such extensive damage to innovation. The Supreme Court has now begun fighting back against the patent trolls.

By overruling the Federal Circuit's general rule that permanent injunctions will issue upon a finding of infringement in a patent litigation case, the Supreme Court has taken away much of the leverage that patent trolls have had in extorting large settlement fees from accused infringers. Additionally, by overturning the Federal Circuit's teaching, suggestion, motivation test for obviousness, the Supreme Court has taken the first step towards preventing patent trolls from being able to sue companies for infringement when those companies are actually utilizing technology that is already in public use or obvious variations thereof. In *eBay*, Justice Kennedy made it known that the Supreme Court will no longer allow patent trolls to have undue leverage and power against innocent and innovative manufacturing companies.¹⁴⁵

It seems that *eBay* and *KSR* are just the beginning of the Supreme Court's battle against the patent trolls. The Supreme Court had not heard a patent case in the twenty five years between 1981 and 2006.¹⁴⁶ Hopefully, the Supreme Court has shown the public what is to come and will continue to hear patent cases in larger numbers in order to keep the patent system orderly and prevent patent trolls from disrupting legitimate manufacturing companies.

142. *Id.*

143. *Id.*

144. *Id.* The lenient obviousness standard is referring to the teaching, suggestion, motivation test.

145. *eBay*, 126 S. Ct. at 1842 (Kennedy, J., concurring).

146. Amy Sorrel, *Supreme Court to Rule: When are medical patents too broad*, AM. MED. NEWS, Apr. 10, 2006 <http://www.amaassn.org/amednews/site/free/pr120410.htm> (last visited June 1, 2007).